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THE DEADLY "THE" OF THE MISSOURI CONSTITUTION WHICH HAS BEEN GIVEN A MISTAKEN IMPORTANCE.

The opinion in *State v. Campbell*, 210 Mo. 202, which held an indictment in a rape case fatally defective for concluding "against the peace and dignity of state" instead of "against the peace and dignity of the state," has been, very lately, reaffirmed by that same tribunal. We understand the court does not repeat its reasoning or add thereto, and for that at least it is to be commended, as we view such reasoning and the somewhat apologetic tone of the former opinion. Just as it does not seem to be a pleasant thing to render such a decision, so the doing of it should be done quickly, if done at all. For prior comment on this matter we refer to editorials in 67 Cent. L. J. 411, and 68 Cent. L. J. 59.

What we now animadvert on, particularly, is, that the court seemed to make of the provision of the constitution—a fundamental thing—neither fish, flesh nor fowl and yet a collocation of words which work out a plain miscarriage of justice. The opinion seems to repudiate the idea, that a fixed immutable phrase is prescribed for the conclusion of an indictment and at the same time the court appears to say, that the very words and all of the words that are prescribed must be used, that is to say, there may be additional words if they are purely surplusage, whether they follow after the word "state" or precede it, if they do not break the connection. Thus "of Missouri" after "state" was held not to affect the words as a formula. *State v. Hays*, 78 Mo. 600. Or adding the words "contrary to the form of the statute."

State v. Schloss, 93 Mo. 361. And an Arkansas case was approved where the word "same" was shown between "the" and "state." Indeed a summary of the view of Missouri Supreme Court is according to what was said in *State v. Waters*, 1 Mo. App. 7, viz.: "The general doctrine is that, if the intent of the constitution be substantially responded to in this part of the indictment, a literal transcript of the formula is not essential," and "if the formula be present other words, not perverting the meaning, will be treated as surplusage." These two quotations seem nearly, if not absolutely in conflict.

Who can tell, we respectfully ask, whether the supreme court means that a "formula" is prescribed or not prescribed? Who can tell whether the very words used must be contained in the formula or not?

After leaving us in the air on this question, and seeming to recognize that it is itself "in the clouds," respectfully again we say, the court endeavors to get to earth by showing that "while . . . the word 'the' is a small one and in many instances of little importance," it is here "absolutely essential in order to designate the particular state against which the offense is charged to have been committed." We must confess that if one admits for an instant, and the court does not intimate to the contrary, that "state" means one of our sovereignties, instead of a condition or status, Diogenes' search for an honest man would be deemed a pleasant recreation compared to the endless tramp one of the judges of Missouri Supreme Court would go on to find a man who would say any other state was meant than that of Missouri. The wandering of Ulysses had its false lures to keep him from Ithaca, but no one would think there was any need to interfere with another on so hopeless a quest, except some relative, mayhap, with a writ *de inquirendo*.

Wherefore there exists no necessity of "the" before "state" if state is conceded to mean one of the United States, for not even our imagination may make it mean

Illinois, Arkansas or any other state than Missouri?

The court seeks to bolster up its conclusion with the only other case existent on this subject, and not finding any reasoning in the opinion rendered, takes judicial notice of a "high standing" being "recognized by both the bench and the bar." We do not wish to seem censorious, but as we view the matter, the Texas Court of Appeals occupies a superior position to the Missouri court, for all omission of its reasons.

To show again how lacking in forcefulness is the reason given for the Missouri court holding invalid an indictment for such an omission, let us note the Illinois case (*Zanessler v. People*, 17 Ill. 101) which it held to be properly ruled. The Illinois constitution required that an indictment should conclude "against the peace and dignity of the same," and one concluding "against the peace and dignity of the people of the State of Illinois" was held to comply with the requirement, because that was what was meant. Also Missouri court said to conclude "against the peace and dignity of the people of," instead of "against the peace and dignity of, the State of Arkansas" was correct, and therefore it seems obviously wrong to say that "against state" instead of "against the state" is not correct. To say against the people of a state instead of against a state does at least introduce an additional concept in a formula, while the omission of "the" before state imports no conceivable difference.

We are more than willing to go along with courts in the theory, that constitutional limitations are to be more anxiously respected than are those in statutes. At the same time, however, we think it a much greater evil, that the spirit of a constitution should be set at naught on any mistaken theory, that it prescribes anything in the way of strict form. It is abhorrent to believe that on its large and deep foundation is to be constructed a petty technicality for defeating justice. Such looks like

the slime of an unclean trail on the graceful column of a temple. The largeness of constitutional view seems dwarfed to a microscopic search for a flaw in rugged harmony. We do not envy any court thus portraying the great pillars the people of its state have hewn for the perpetuation of free government. Technicalities in applying statutes or the common law may often subserve a wise purpose. If they fetter constitutional design, they seem necessarily odious.

In closing we wish to record two reasons against the conclusion that the word "the" was used as being necessary to particularize a state, and we venture to say nine out of ten lawyers will agree that they are sound. First: The expression is taken from the common law and there it was used in no such sense. Thus the conclusion was "against the peace and dignity of the king." But if there was but one king of England, as was the fact, there was no other from whom he could be particularized. Second: There is but one state which each constitution concerns itself about and therefore where it speaks of, the peace and dignity of a state it means that state and cannot possibly mean any other state. A third reason, we believe, is one to which ninety-nine out of every hundred minds will agree, lay and professional, learned and unlearned. That reason is, that to omit the word "the" would produce a solecism, be a departure in every day form of speech, be regarded as an oddity in ordinary expression. Let us try it by taking a form which the court says is unobjectionable, viz.: add to the expression "of Missouri." Would one use "the" before state or not? Of course he would. But whether he did or not would it make any difference in sense? Suppose you omit "the" before "peace" is anything lost? Nothing. And yet the phrase would not be in accordance with universal usage.

There appears to be a fearful responsibility in Missouri for a slight slip from mere vogue in "English as it is spoke."

NOTES OF IMPORTANT DECISIONS.

FOREIGN CORPORATIONS—RIGHT OF UNLICENSED CORPORATION TO RECOVER THE SUBJECT OF A CONDITIONAL SALE.—The contract of a foreign corporation not licensed under Wisconsin law to do business in that state is by statute made void in behalf of such a corporation, but enforceable by the other party against it. A foreign corporation in this situation sold by a conditional contract of sale to a resident of Wisconsin a piano, which contract gave the seller the option, upon default, to declare all unpaid instalments due and bring suit therefor, or to take possession of the piano, sell the same at public or private sale, credit net proceeds of sale on the note given by the purchaser and retain all prior payments as liquidated damages. See *Duluth Music Co. v. Clancey*, 120 N. W. 854. In this case the purchaser defaulted on his payments and the corporation brought replevin for the piano. In the trial court the defendant had judgment. The corporation claimed that despite the invalidity of the conditional sales contract (and possibly for that very reason) the action lay because the title and right of possession remained in the corporation. It was said the defendant "acquired no right to the piano, except that conferred by the void contract, and assuming that the conditional sale contract is invalid, the former ownership and right of possession of appellant continues unaffected by the void contract." The court distinguished this case from *Dunlap v. Mercer*, 156 Fed. 545, 86 C. C. A. 435, cited in support of this contention, on the grounds that the statute there considered did not, like the Wisconsin statute, declare the contract void as to the corporation but enforceable against it, nor did there appear to be any past performance or past payment by the purchaser. Then the court says: "There is doubtless a limit beyond which the law cannot go in holding one party to an illegal contract bound and the other free, but that limit is not reached or passed in a case where this provision can be considered an additional penalty on that party for violation of law, or where the law breaking party seeks to assert the invalidity of the contract and recover back its property without returning the consideration received by it." Then the court argues that just as in contracts of sale invalid for mistake or fraud, along with rescission must be a return of what has been received, so when by statute a sale is void only against one but enforceable by the other, and there is at least the right of possession, "the seller cannot assert that no con-

tract ever existed, and retake the goods in replevin without tendering a return of what has been received."

But no such tender having been made the court declined to say what effect such tender should have had on the fate of the replevin suit.

The reasoning of the court seems unassailable to the extent it went, unless there is something more than intimation by the court in what it says about "additional penalty." Forfeitures are rarely favored and the statute being a general rule for all kinds of contracts it should not be held to work an absolute divestiture of title. The *Dunlap* case *supra* says: "The general rule that an illegal contract is void and unenforceable is, however, not without exception. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty or by rational implication from the language of the statute which it violates, and that statutes prescribe other specific penalties" these are exhaustive. The Minnesota statute merely forbade the maintaining of a suit and it was held not to invalidate the conditional sale contract there considered, which statute was held not operative as to suits and proceedings in federal courts. All that is said in the opinion about the rights of the vendor in a void contract of sale was unnecessary to the decision, but it displays the same gratuitous violence in speech that the writer of the opinion often allows to mar his utterances. Thus he speaks of "no court which strives to do justice and succeeds," failing to take the course he there declared was the right one, and this in a case where the lower court was being reversed.

MASTER AND SERVANT—RESPONSIBILITY OF CORPORATION FOR MALICIOUS AND WANTON ACTS OF EMPLOYEES.—The Supreme Court of North Carolina has lately considered the question of the liability of a railroad company for an employee shooting another under circumstances that appeared purely wanton and malicious and when no purpose in the interest of the company seemed to be subserved. These were the facts. Plaintiff attempted to climb upon the company's box car attached to a moving freight train so as to steal a ride. A flagman on top of the car told plaintiff to come up to him, but plaintiff started to run away and he had not gotten more than eight feet away when the flagman shot him twice. The jury found in answer to special interrogatory that the flagman was not acting within the scope of his employment, but their general verdict was for plain-

tiff. The majority of the court held that this issue was properly submitted to the court and judgment was ordered entered for defendant. *Jones v. Seaboard A. L. H. Co.*, 64 S. E. 266. The dissent by Clark, C. J., takes the position that the undisputed facts show there was no basis for this finding by the jury. He says: "The flagman was in the discharge of his duty in discovering the plaintiff, and could not put off that character and without change of position assume another while the plaintiff was running eight feet, which a calculation shows was less than half a second. He could not be an employee of the railroad when he frightened the man and ceased to be an employee within the one hundred and twentieth part of a minute while the frightened man was running eight feet. As the flagman fired and struck the fleeing man twice before he could run eight feet, the pistol must have been drawn and presented before the plaintiff turned to fly." We do not know if this argumentation presents such a showing of physical impossibility as to take the matter away from the jury upon the question as to whether the flagman was acting within the scope of his duty. The dissent is more nearly based, as we view the matter on the course of judicial decision, instanced and discussed. Thus one North Carolina case held a company liable for a station agent killing an ex-passenger in a difficulty over the delivery of a trunk; another for a conductor kissing a passenger and another for employee blowing a whistle so as to frighten plaintiff's horse.

The dissent also goes upon another theory, which distinguishes railroad corporations from other employers, which may be thought interesting, if not in fact sound. The judge says: "The liability of a farmer, merchant or other citizen in the performance of his inherent right to do business, for the conduct of his agents is necessarily not so broad as that of these great corporations, which are given artificial existence and great special privileges, on the ground not only that they shall be used for the public benefit, but on the implied agreement that they shall not be used to the public detriment. Using both physical and pecuniary power, they must be liable for its misuse, and employing great numbers of men they alone can control them and are responsible for their discipline." That sort of language sounds more populist than scientific, and if we get into that sort of atmosphere for the ascertainment of a legal principle we will not be apt to aid in that harmonious application of settled principles to new conditions that we so much need.

THE RIGHT OF ACCESS TO NAVIGABILITY—IS IT PRIVATE PROPERTY WHICH CANNOT BE TAKEN FOR PUBLIC PURPOSES WITHOUT COMPENSATION?—I. TO THE WATER'S EDGE.

The very existence of government involves a subordination of private rights to the general welfare; and when public exigencies demand it, there is no species of property which may not be destroyed or taken from the individual owner, by the authorities of the state. This is a rule of necessity and is recognized everywhere, in the lowest type of government as well as in the highest; among wandering hordes (whose only government consists of the authority of a chief and the customs and practices which enable him to maintain his authority) and among the most civilized communities. But in constitutional governments the aim is to define the circumstances which will justify the taking or destruction of property belonging to the individual, to define the mode in which it may be taken or destroyed, and to provide safeguards against the capricious or malicious exercise of the power to take or destroy. Provision is also usually made for compensation to be paid to the owner of the property when it is taken, destroyed or injured in the interest of the public. There are indeed instances in which no compensation is awarded,¹ and it has been

(1) The most familiar instances of this kind relate to property which by reason of the particular use to which it is devoted constitutes a public nuisance. Thus a house used as a resort for prostitutes may be abated as a nuisance. *Childress v. Nashville*, 2 Sneed, 347; *Roger v. People*, 9 Colo. 450; *People v. Hanrahan*, 75 Mich. 621. But this is not to be taken as meaning that the house itself may be destroyed, the abatement of the nuisance only requiring as a rule that the prostitutes be compelled to remove. Still it would seem to be within the power of the legislature to provide for the destruction of the house. *Welch v. Stowell*, 2 Doug. (Mich.) 332. So a filthy house infected with cholera, "under the floors of which were 20 tan vats, most of which were filled with putrid stagnant water which oozed through the floors on walking over them," may be destroyed. *Meeker v. Van Rensselaer*, 15 Wend. 347. So nets for catching fish set in violation of law may be summarily destroyed by a public officer, without liability to the owner.

held that the property right of access to navigability, is of such a nature that when destroyed as the result of improvement to navigation made by the government or under governmental authority, the owner is entitled to recover nothing. On the other hand, many of the courts take the contrary view, and the purpose of this article is to review the law upon the subject for the purpose of determining which rule is supported, by the weight of authority and reason. To this end let us first attempt the

Analysis of the Right of Access.—What is meant by the proposition that the owner of land abutting upon navigable water has the right of access to navigability? Of what does the abutter's right consist? In general it is said that the abutter has a

Lawton v. Steele, 119 N. Y. 226, 16 Am. St. Rep. 813, 152 U. S. 133, 33 L. ed. 385, 7 L. R. A. 134. So the instruments used for frying "fat" used within the limits of a city contrary to ordinance. *People v. Rosenberg*, 67 Hun. 60, 22 N. Y. Supp. 56. So a boat used in unlawfully disturbing oysters. *Colon v. Lisk*, 13 App. Div. 199, 43 N. Y. Supp. 364. So a wooden building erected within fire limits contrary to ordinance of city. So also electric light poles after revocation of license may be removed from street. *Coverdale v. Edwards*, 155 Ind. 383; and milk not up to the required standard may be destroyed without compensation to the owner. *Dems v. Baltimore*, 26 L. R. A. 541. Dogs or cats may become a nuisance and may be killed without liability. *Blair v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82; and horses affected with glanders, or cattle with contagious diseases. *Pearson v. Zher*, 138 Ill. 48; *Miller v. Horton*, 152 Mass. 540, 10 L. R. A. 116. But in *Loesch v. Koehler*, 144 Ind. 278, 35 L. R. A. 682, it was held that a statute authorizing any agent of any society for the prevention of cruelty to animals to kill neglected or abandoned animals was unconstitutional. "At common law every one had the right to destroy real and personal property in cases of actual necessity to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. In the case of the *Prerogative*, 12 Rep. (Coke) 13, it is said: For the Commonwealth a man shall suffer damage, as: for saving a city or town a house shall be plucked down if the next one be on fire; and a thing for the Commonwealth every man may do without being liable to an action. There are many other cases besides that of fire, some of them involving the destruction of life itself where the same rule is applied. The rights of necessity are a part of the law." *Republica v. Sparhawk*, 1 Dall. 357; *Bowditch v. Boston*, 101 U. S. 16, 25 L. Ed. 980. Hence in the case last cited, it was held that in order to recover under a statute changing the common law rule, strict compliance with the requirements of the statute must be shown.

right to make connection between his upland and navigable water by wharfing out thereto or in any other way that does not interfere with the public use of the water. The right thus to make connection between his upland and the navigable channel taken alone by itself, is obviously of much less value than when linked with the public right of passage to and fro upon the navigable channel. Indeed, without that link there would ordinarily be no object in obtaining access to navigability, for access to the water's edge or to low-water mark would, as a rule, as fully suffice for domestic purposes as access to the deeper water. It is hence the right of passage to and fro upon the navigable highway that gives the right of access its chief, if not its only value. The value of the abutter's wharf is dependent not upon the private right of access, but upon the public right of navigation. But let us look a little deeper. Is it correct to say that the value depends altogether, or even more largely upon the right of access than upon the right of navigation? Are not both rights essential factors to the product, viz.: the value of the wharf? Free locomotion from the wharf to the land is necessary in order that it may be useful as a medium for the transportation of such commodities as may be available for transportation. So also is free locomotion from the wharf to the boat, and this freedom of locomotion is involved in the right of access. Both this right and the right of navigation are essential to the value of the wharf, and where both factors are essential to a product, can it be said that one is more important than the other? Eliminating the wharf, for, of course, it is not absolutely necessary to obtain access to the navigable portion of the stream, it will be seen that the right of navigation and of access, so far as they give special advantages to the riparian owner, must be regarded as interdependent. Taken together, these rights do certainly give the riparian owner advantages in the enjoyment of the land and the river which do not pertain to those who are not riparian owners, unless

the general public have also the right to use the shore-line of navigable waters for purposes in aid of navigation. It is therefore important to determine

The Character of the Right of Access—Is it Exclusive, or is it a Right Common to the Public?—Have all who use navigable waters as a highway for travel the right to go from water craft to shore and from shore to water craft as occasion demands? Or has the abutting owner the right to exclude the public from such use of the shore-line within the boundaries of his land? Before referring to adjudicated cases let us look for a moment at the situation which might be presented under the doctrine that the abutter has exclusive right of access. If his right is "exclusive," in the strict sense of that term, he can admit or exclude the public from that portion of the shore owned by him at his will. And what one abutter can do with respect to a moiety of the shore-line, all acting together can do with respect to the whole. Thus the abutting owners could absolutely control navigation if so minded. It needs no elaboration to suggest that the abutter's control of access is not absolute, that his title, whatever it may be in a technical sense, does not give him the power of control over land along high-water mark, which a fee simple is recognized as giving with respect to land remote from water. Hence while some of the cases speak of the abutter's right as exclusive, their examination will show that such remarks were not intended to be taken in the literal sense of the language used. An examination of the cases will also show the influence of,

The Civil Law Rule, with Respect to Control of the Shore.—Louisiana is perhaps the only state in which the Civil Law predominates over the common law in determining property rights generally. At any rate, in that state the rule of the civil law seems to have been adopted with respect to riparian rights. The owner of property abutting upon the Mississippi river must

allow the public free use of the shore-line.² A mill owner, who, in pursuance of a license granted by a city, erects works on the banks of the river to facilitate the handling of timber at his mill, may be required afterwards to remove them if they obstruct the free use of the banks to which the public is entitled.³ "And wharves, buildings and mills erected on the banks of the Mississippi river in such a way as to obstruct the public right of passage along the banks are nuisances and the city of New Orleans may abate or destroy them as such." In fact it would seem that the public are as much entitled to the use of the shore-line for navigation purposes as to the use of the stream itself.⁴

(2) *Hanson v. Lafayette*, 18 La. 295. "By the civil law the public seems to have had the right to use the banks and shores to practically the same extent as its right to use the water itself. As stated in Sandars, Justinian, p. 159, the public use of the banks of a river is part of the law of nations, just as that of the river itself. All persons, therefore, are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there, as to navigate the river itself. But the banks of a river are the property of those whose land they adjoin, and consequently the trees growing on them are also the property of the same person. Wood, Civil Law, 82, states that *res publicae* are those things which belong to some certain people, or to those to whom the regalia appertain; but the use of them ought to be common to all men, at least of that nation, as highways, ports and rivers. And therefore the right of sailing and fishing is public in such rivers and ports, as also the use of the banks of the rivers to unload burdens on them, to tie cables and ropes to the trees belonging to those to whose estates they are joined." Note to *Hartman v. Tresise*, 84 Pac. 685, 4 L. R. A. (N. S.) 872.

(3) *Shepherd v. Third Municipality*, 6 Rob. (La.) 349, 41 Am. Dec. 269.

(4) The abutter cannot construct levees or works that will prevent the free use of the banks to all men. *Hanson v. Lafayette*, 18 La. 295. His right to the use of the bank is not, it would seem, regarded as private property, but merely such right as the public enjoys. *Sweeney v. Shakspeare*, 42 La. Ann. 614, 21 Am. St. Rep. 400. And the reclamation of swamp lands along the shore will not justify encroachment upon the public's right of passage. *Henderson v. New Orleans*, 3 La. 563. *Allard v. Lobau*, 3 Mart. N. S. 293; and a purchaser at public sale is chargeable with knowledge that the law requires a space to be left for public use as a road along the bank of navigable rivers, and cannot because a part of the premises purchased is burdened with such servitude, escape liability for the full purchase price. *Bourg v.*

The constitution of the state of Washington provided for the appointment of a commission to establish harbor lines and to lease the right of building wharves,⁵ and it was held that the owner of land abutting upon the sea or its arm, has no right to erect wharves in front of his land below high-water mark.⁶ And in the same case the court said: "Riparian proprietors on the shore of navigable waters of the state have no special or peculiar rights therein as an incident to their estate. To hold otherwise would be to deny the power of the state to deal with its own property as it may deem best for the public good. If the state cannot exercise its constitutional right to erect wharves and other structures upon its public waters, in aid of navigation without the consent of adjoining owners, it is obviously deficient in the powers of self development, which every government is supposed to possess."⁷ The Washington court professed to follow the common law rule. But its decision went further than the weight of authority under that rule

would seem to justify, and in a later case involving the consideration of riparian rights which had vested before the adoption of the state constitution, this was apparently recognized.⁸ If the court had said that the riparian proprietor has no rights which are not subordinate to public easements incident to navigation, the proposition would have the support not only of the civil law, but perhaps the weight of common law authority.⁹ A right thus qualified might be very valuable both to the possessors and to the public at large, and to deny it altogether seems unnecessarily to impede the use of nature's natural forces. But the right of access is not the same thing as the right to wharf out to navigability, and some states that deny the latter right altogether, declare that the former cannot be taken without compensation.¹⁰

Niles, 6 La. 77. But the property of the banks of the Mississippi river is in the abutting owner, the public having only an easement therein. *De Ben v. Gerard*, 4 La. Ann. 30. And the public easement is confined to the use of the bank for purposes incident to navigation. *Lyons v. Hinckley*, 12 La. Ann. 655. Hence a city has no right to permit the construction of buildings not designed to promote navigation. *Leonard v. Baton Rouge*, 39 La. 275, 4 So. 241. And a wood yard does not come within that category. *Carrollton v. R. Co. v. Winthrop*, 5 La. Ann. 36. Occupancy of the banks for public use cannot afford a basis for prescription, because such occupancy is consistent with the abutter's title. *Remy v. Municipality No. 2*, 11 La. App. 148. If more land is taken than is needed for public use for levees, highways, etc., the riparian owner may seek for a reduction. *Louisiana Ice Mfg. Co. v. New Orleans*, 43 La. Ann. 217, 9 So. 21. The use of land lying between the levee and the river is in the public and adjacent property cannot be assessed for opening a street thereon. But if the levee be advanced nearer the river, the batture becomes private property, which, if taken for public use, should be paid for, and an assessment for that purpose is valid. *Re Municipality No. 2*, 7 La. Ann. 76. Note *Hartman v. Tresise*, 4 L. R. A. (N. S.) 874.

(5) Art. 15 Const. Wash.

(6) *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632.

(7) *Eisenbach v. Hatfield*, 12 L. R. A. (Wash.) 642, citing *Galveston v. Menard*, 23 Tex. 349.

(8) *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 501, 54 L. R. A. 190. In *Eisenbach v. Hatfield*, Stiles J. dissenting from the opinion of the court said: "The court has found that upon authority, a riparian proprietor upon the shore of the sea or its arms, has no rights as against the state or its grantees to continued access to the water to extend wharves in front of his land below high water mark. In the language of Mr. Lewis, in his work on *Eminent Domain*, p. 83, it has done so by a narrow and technical course of reasoning, based upon the fact that the title to the soil is in the state or public and has not as I conceive accepted the great weight of authority in England and America. To my mind in reaching its conclusions, it has completely ignored the prime common source of the state's title and the riparian claim to access which is that the navigable waters are natural public highways."

(9) Mr. Gould says: Riparian owners upon navigable fresh rivers and lakes, may construct in shoal water in front of their land, wharves, piers, landings and booms in aid of and not obstructing navigation. This is a riparian right, being dependent upon title to the bank and not upon title to the river bed. Its exercise may be regulated or prohibited by the state, but so long as it is not prohibited it is an implied right derived from the passive or implied license by the public. As it does not depend upon title to the soil under water it is equally valid in the states, in which the river beds are held to be public property, and in those in which they are held to belong to the riparian owners. . . . The legislatures may authorize the extension of such structures beyond low water mark, but if not sanctioned by the legislature they are illegal so far as they interfere with or limit the right of navigation. *Gould Waters 176*, cited *Lewis v. Portland*, 25 Or. 132, 42 Am. St. Rep. 772, 35 Pac. 256, 22 L. R. A. 736.

(10) This is true in Illinois. In *Revell v. People*, 177 Ill. 468, 43 L. R. A. 790, the court denied the right of the owner of land abutting

Between the rule of the civil law which gives the general public the right to pass from the shore to navigable water as freely as the riparian owner, for the purposes of navigation, and the theory that would give the latter the absolute and exclusive control of the shore is what may be called a middle doctrine, which restricts the right of the public to cases of emergency or necessity.

The Necessity that Gives the Right to Land at a Private Wharf or Shore—does not seem to have been clearly defined. It has been said that: "The right to the use of a navigable river as a highway for passage, is distinct from the right to land for the purpose of discharging freight and passengers. The former is secured to the public; the latter must be exercised with reference to the rights of riparian owners; and except in cases of peril, or emergency of navigation, a navigator cannot land with-

on Lake Michigan to erect wharfs in the water, distinguishing the right of the riparian owner on the Mississippi on the ground that he owned to the middle of the stream and would therefore only be erecting wharfs on his own land, which would be lawful as long as he did not interfere with navigation. In this case the court declared that the shore owner had only two common law rights, viz., that of accretion and of access. "The shore owner also has . . . the right of access from his land to the lake; in other words the right to pass to and from the waters of the lake, within the width of his premises as they bordered on the lake. This right cannot be diverted or taken from the shore owner, without just compensation being made therefor. These are common law rights, and as we understand the law they are the only common law rights possessed by the shore owner." See also *Middleton v. Pritchard*, 4 Ill. 510; *Ensminger v. People*, 47 Ill. 384; *Cobb v. Lincoln Park Commissioners*, 202 Ill. 427, 63 L. R. A. 264. Compare the last case with *Brookhaven v. Smith*, 188 N. Y. 74, 80 N. E. 665, 9 L. R. A. (N. S.) 326, in which the New York court arrived at a conclusion exactly opposite to that of the Illinois court, the facts being substantially the same in each case. In Connecticut the right to wharf out to navigable water is recognized, although the ownership of the soil under the water is in the state, but the right is subject to the provision that the wharf does not interfere with navigation. *East Haven v. Hemingway*, 7 Conn. 186; *Simons v. French*, 25 Conn. 346; *Mather v. Chapman*, 40 Conn. 382; *State v. Sargent*, 45 Conn. 358; *Prior v. Swartz*, 62 Conn. 132, 18 L. R. A. 668; *Lane v. New Haven Harbor*, 70 Conn. 694, and this is the general rule in the United States, *Madison v. Mayers*, 97 Wis. 339, and note to S. C. 40 L. R. A. 645. *Hunter v. Sandy Hill*, 6 Hill, 407; *Backus v. Detroit*, 49 Mich. 110.

out the consent of the owner, and in return for the privilege of landing, a reasonable compensation may be demanded."¹¹ It is not to be supposed however, that the right to land in the case of shipwreck, would be subject to the will of the riparian owner, or that he would have the right to exact a payment for the use of his shore by those who took refuge on it to escape from drowning.¹² That he should have a right to recover for unnecessary injury to crops or other property seems reasonable, and such no doubt is the law.¹³ It is in connection with log driving that the use of the shore by those engaged in navigation is perhaps most frequently found

(11) *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644. Note *Hartman v. Tresise*, 4 L. R. A. (N. S.) 877.

(12) RIGHT OF WHARF OWNER AND OF MARINERS IN CASE OF PERIL. The case of *Dutton v. Strong*, 66 U. S. 29, 17 L. Ed. 29, upholds the right of the riparian owner to protect his wharf by cutting the lines and setting adrift a boat which has been moored to the wharf without the owner's consent during a storm. The wharf it appears was about to give way and in order to save it, the owner cut the hawser which fastened the boat to it. As a result the boat was wrecked. The owner of the boat brought suit to recover the damage done. In denying the liability of the wharf owner the court said: "Piers or landing places, or even wharfs, may be private, or they may be in their nature public, although the property may be in an individual owner, or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use, or he may be under obligations to concede to others the privilege of landing their goods, or of mooring their vessels there upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend in case of dispute upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located and the nature and character of the structure. Undoubtedly a riparian proprietor may construct any one of these improvements for his own exclusive use and benefit and if not located in a harbor or other usual resting place for vessels, and if confined within the sea or the unnavigable waters of a lake and it had not been used by others, or held out as intended for such use, no implication would arise in a case like the present, that the owner had consented to the mooring of the vessel to the bridge pier." One cannot help wondering if the decision would have been the same in case passenger or crew had been drowned as a result of the cutting of the hawser. See also *Heaney v. Heaney*, 2 Den. 625.

(13) *Weise v. Smith*, 3 Or. 445, 8 Am. Rep. 621; *Haines v. Hall*, 17 Or. 165, 20 Pac. 831, 3 L. R. A. 609; *Hunter v. Grand Ronde Lumber Co.*, 39 Or. 451, 65 Pac. 598.

convenient if not absolutely necessary. On the small streams it is the practice for the log-drivers to walk along the shore and to go to and from the logs in the water as occasion demands. The right to do this has been claimed as a matter of common law. But save in Louisiana it does not seem to have been recognized as a legal right.¹⁴ Even the Washington court which as we have seen, denied that riparian owners had any peculiar rights as such owners, holds that log drivers have no right to use the banks to assist them in driving their logs to market;¹⁵ and that such right must either be acquired by purchase or condemnation proceedings. This is on the theory that the constitutional provision reserving title to the state in land under navigable waters does not apply to streams which are valuable only for floating logs to market during annual freshets,¹⁶ and that the fee to the land is in the riparian owner.¹⁷ Some states have by statute enlarged the rights of log drivers in the use of the banks,

(14) *Haines v. Hall*, 17 Or. 165, 3 L. R. A. 609. In *Olsen v. Merrill*, 42 Wis. 213, the court said: "We of course recognize the position that the navigable character of a stream cannot depend upon trespass upon shore; and that one floating his logs down stream has no right to use the banks of the stream to aid him. . . . We take it that a stream that is of sufficient capacity to float logs, is of sufficient capacity to float some kind of boat or skiff in which the owner may follow his logs. This might sometimes be inconvenient or even dangerous, but the stream is none the less navigable because persons using it are induced by convenience to prefer unlawful to lawful means in aid of the use." In *Hooper v. Hobson*, 57 Me. 273, "the right of the public in a stream capable of being used for floating logs . . . is not thus to be extended over adjoining land. The water makes and defines the highway. Except during the continuance of an overflow, or in the exercise of those privileges which are given or defined by statute, log owners and river drivers have no right in a floatable stream beyond the boundaries. Their liability to pay damages to riparian owners for travelling upon the banks to propel their logs, is expressly recognized in *Brown v. Chadbourne*, 31 Me. 9."

(15) *Watkins v. Dorris* (Wash.), 54 L. R. A. 199.

(16) *Watkins v. Fairhaven Land Co.*, 54 L. R. A. 199.

(17) The theory that riparian rights are dependent upon ownership of the soil under the water seems to prevail in Illinois. *Revelle v. People*, 177 Ill. 468, 43 L. R. A. 790; *Cobb v. Lincoln Park Commissioners*, 202 Ill. 427, but is contrary to the general doctrine. *Gould, Waters* 176, *Lorman v. Benson*, 8 Mich. 30.

and have at the same time provided for the recovery of damages by the riparian owner when the log driver oversteps his rights.¹⁸

A review of the authorities leads to the irresistible conclusion, that while the right to the use of the shore land is not absolutely and exclusively in the riparian owners, yet their right is so far exclusive, that other navigators cannot avail themselves of the use of the shore land for ordinary commercial purposes without the consent of the riparian owner save by condemnation proceedings, to establish landings or wharves for public use. So far as the writer's investigation has gone Louisiana seems to be the only state where the dry shore land is burdened with easements subservient to navigation.

W. A. COUTTS.

Sault Ste. Marie, Mich.

(To be concluded in next week's issue).

(18) Mich. Com. Laws. 5081-5098. For the respective rights of log drivers and riparian owners under these statutes and under the common law see note to *Coyne v. Mississippi & Rum River Boom Co.*, 41 L. R. A. 494, also note to *Crookston W. P. L. Co. v. Sprague*, 64 L. R. A. 986; *Smith v. Atkins*, 53 L. R. A. 791; *Compton v. Hawkins*, 90 Ala. 411, 24 Am. St. Rep. 823, 8 So. 75, 9 L. R. A. 387. In Louisiana, it was held that when logs were driven by a high wind upon the lands of a riparian owner the latter had no right of action if the owner of the logs did not permit them to remain upon the land an unreasonable length of time after the abatement of the storm. *New Orleans & Northeastern Ry. Co. v. McEwen & Murray*, 49 La. Ann. 1184, 38 L. R. A. 134.

WHARF AND LANDING PRIVILEGES. In *Bainbridge v. Sherlock*, 29 Ind. 364, it is said, "The river being public and its banks being private, it is not difficult to discover the true foundation of those riparian rights known as wharf rights. It is essential to the successful prosecution of his business, that the navigator shall make frequent landings to load and unload, to receive and discharge passengers, and to receive supplies. But except in case of some peril or emergency of navigation, he cannot thus land without the consent of the riparian owner, and in return for the privilege of landing, a reasonable compensation may be demanded. This is the origin of wharfage," quoted in *Compton v. Hawkins*, 90 Ala. 411, 9 L. R. A. 387. See note 12. In *Washburn on Easements* (p. 554) the author says: "In regard to the right to land upon other points of the banks of a navigable stream than those which have in some way become public landings, the law would seem to confine it to cases of necessity, where, in the proper exercise of the right of passage upon the stream of water, it becomes necessary that one should make use of the bank for landing upon or fastening his craft in the prosecution of his passage." Quoted 9 L. R. A. 387.

SET-OFF AND COUNTERCLAIM—EQUITABLE SET-OFF.

TUTTLE v. BISBEE.

Supreme Court of Iowa, April 10, 1909.

A maker of a note payable on demand bearing interest at the rate of 8 per cent, per annum, and providing for 8 per cent. interest on interest not paid at maturity, rendered services to the payee during a period extending from a date prior to the execution of the note to nearly seven years thereafter. During the period nothing was credited on the note. Held, that the court, in an action on the note, properly applied the total items of each year's services as a credit on the note on the last day of such year.

LADD, J.: The defendant gave his promissory note to the plaintiff February 1, 1908, for \$291.15. It was payable on demand and bore interest at the rate of 8 per cent per annum, payable annually, and provided that "should any of the interest not be paid when due it shall bear interest at the rate of 8 per cent per annum." The action was begun August 9, 1907, up to which time nothing had been credited on the note. The "answer and counterclaim" averred that the note had been fully paid, that defendant had rendered services for plaintiff as set out in an itemized account extending from December 20, 1897, to October 30, 1906, of the reasonable value of the several items, and prayed for judgment thereon, and that "the account be ascertained that is due this defendant over and above the amount of the note sued on, and that the charges as they appear in defendant's bill of particulars be deducted from the note as held by the plaintiff as of the date of the items, and for all other legal and equitable relief in the premises, and that an accounting be had between plaintiff and defendant." By way of reply, plaintiff admitted the correctness of the account, but asserted that, as the account was continuous and open, defendant was entitled to interest thereon from six months after the last item only and then at 6 per cent per annum, that he was not entitled to have the items applied as payments on the note until the filing of the answer and counterclaim, and is "not entitled to equitable relief." A jury was waived, and the cause submitted on the pleadings, save that the note was introduced in evidence. The court applied the total of items of each year as a credit on the note on the last day of said year and found there to be due the defendant the sum of \$18.26, for which judgment was entered. It will be observed that no issue of fact is presented by the pleadings, and that the action was rightly begun on the law side of the calendar.

Section 3428 of the Code. No error as to the kind of proceedings adopted then appears to have been made, so that the cause might not have been transferred to the equity side of the docket, even though motion that this be done had been filed. *Johnston v. Robuel*, 104 Iowa, 523, 73 N. W. 1062. But in such a case "either party shall have the right, by motion, to have any issue heretofore exclusively cognizable in equity tried in the manner hereinafter prescribed in cases of equitable proceedings." Section 3435 of the Code. No motion to have the issue heard as in equity was presented, but the answer definitely prayed for equitable relief, in that the items of the account be applied on the note as of their dates, and the right thereto was specifically challenged by the reply. As the issue was thus made, we are of the opinion, in view of the fact that the cause was submitted on the pleadings, that the question was presented to the court whether credit should be applied as an equitable set-off.

The account began in December, 1897, and amounted to but \$19.25 prior to the execution of the note, February 1, 1908. This note was matured during the remaining eight years and more of the account. During this period payment for the services as rendered at each of the 85 different times became due and owing the defendant when performed, and the note was payable at each of these several dates until satisfied. It is unreasonable to suppose that the one or the other of the parties would have allowed so long a period to elapse but for the implied understanding that the noninterest-bearing items of account were to be credited on the note. Mutual debts were inextinguishable at the common law, but by the civil law under the doctrine of compensation relief was granted by "the reciprocal acquittal of debts between two persons who are indebted the one to the other." "Compensation is the extinction of debts of which two persons are reciprocally debtors to one another, by the credits by which they are reciprocally creditors to one another." 2 Story, Eq. Jur. § 1437. In the work cited the author notes "that, independently of the statutes of set-off, courts of equity, in virtue of their general jurisdiction, are accustomed to grant relief in all cases where although there are mutual and independent debts, yet there is a mutual credit between the parties founded, at the time, upon the existence of some debts due by the crediting party to the other. By mutual credits, in the sense in which the terms are here used, we are to understand a knowledge on both sides of an existing debt due to one party and a credit by the other, founded on and trusting to such debt as a

means of discharging it." Story's Eq. Jur. § 235. In *Trent v. Tenn.*, 3 Doug. 257, Mr. Justice Buller observed that "wherever there is a trust between two men on each side, that makes a mutual credit," and Mr. Justice Dallas declared in *Key v. Flint*, 8 Taunt. 21, that "'mutual credit' meant something different from mutual debts. Mutual credit must mean mutual trust." The cases are reviewed in *Greene v. Darling*, 5 Mason, 207, 213, Fed. Cas. No. 5,765, summing up thus: "The conclusion which seems deducible from the general current of the English decisions (although most of them have arisen in bankruptcy) is that courts of equity will set off distinct debts where there has been a mutual credit, upon the principles of natural justice, to avoid circuity of suits, following the doctrine of compensation of the civil law to a limited extent. That law went further than ours, deeming each debt *sub jure*, set off, or extinguished *pro tanto*; whereas, our law gives the party an election to set off, if he chooses to exercise it; but if he does not, the debt is left in full force, to be recovered in an adversary suit. Since the statutes of set-off of mutual debts and credits, courts of equity have generally followed the course adopted in the construction of the statutes by courts of law, and have applied the doctrine to equitable debts. They have rarely, if ever, broken in upon the decisions at law, unless some other equity intervened, which justified them in granting relief beyond the rules of law, such as has been already alluded to; and, on the other hand, courts of law sometimes set off equitable against legal debts, as in *Bottomley v. Brooke* (cited 1 T. R. 619). The American courts have generally adopted the same principles, as far as the statutes of set-off of the respective states have enabled them to act." Since the enactment of statutes allowing a set-off or counterclaim to be pleaded in actions at law, the courts of equity have usually followed the law, save when peculiar equities intervene. 2 Story, Eq. § 1437. Such cases are too various for citation. Ordinarily a mere claim or account will not furnish ground for relief. As said by Judge Story, in section 1435 of the work cited: "Independently of the statutes of set-off, courts of equity, in virtue of their general jurisdiction, are accustomed to grant relief in all cases where, although there are mutual and independent debts, yet there is a mutual credit between the parties, founded at the time upon the existence of some debt due by the crediting party to the other. By 'mutual credit,' in the sense in which the terms are here used, we are to understand a knowledge on both sides of an existing debt due, to one party, and a credit by the other

party, founded and trusting to such debt as a means of discharging."

This well describes the situation of the parties in the case before us. No other inference is reasonably to be drawn from the facts disclosed than they were trusting to the services rendered by defendant, concerning which there was no controversy, to satisfy plaintiff's demand. The precise question was before the Supreme Court of Georgia in *Meriwether v. Bird*, 9 Ga. 594. An action was brought by an administrator on a note. One of the makers set up an account for legal services rendered plaintiff's decedent after the maturity of the note, and the court, after recognizing the plea of set-off as good in bar, referred to the doctrine of set-off under the civil law, and speaking through Lumpkin, J., proceeded: "The rule of that Code has been correctly cited by the learned counsel, from Pothier, namely: If you have a debt due from me, which carries interest, and afterwards become my debtor of a sum which from its nature does not carry interest, my debt will be held to be discharged to the extent of the mutual credit, from the time of such credit taking place, and interest would only be due for the balance, from that time—and the author puts the following illustration: If you are my creditor of a sum of £1,000 for the price of an estate which you have sold and conveyed to me, and afterwards you become sole heir to Peton, and in that quality my debtor for £800, the amount of a loan from me to Peton; from the death of Peton, your demand of £1,000 is to be regarded as acquitted to the amount of £800, and submitting only for the remaking £200, and from the death of Peton the interest will only continue to run upon the remaining £200. Is there anything in our law of set-off which excludes this construction? I know of nothing, and it is so manifestly right that it commends itself to the conscience of every man. Interest is only given by way of damages for the detention of a debt. * * * But there is another principle which would seem to entitle the defendants to the relief which they seek, and that is, in cases of mutual credit, where there is knowledge on both sides of an existing debt due to one party and a credit by the other party, founded on and trusting to such debt, as a means of payment, that the law will so apply it."

Equity will intervene to effect a set-off only when under the strict rules of the law justice cannot be effectuated, and we are of opinion that the record presents such a case. Decisions to the contrary may be found, but in all to which our attention has been directed the defenses or counterclaims were at law,

and equitable relief was not prayed. The rule adopted will effectuate justice, and, as seen, is supported by authority.

Affirmed.

NOTE.—The Influence of Statutes Regulating Set-off and Counterclaims on Equitable Set-off.—The opinion in the principal case, dissented to by one member of the court, relies it is perceived on no recent adjudications. It concedes that there has been some change in the current of decision since the enactment of statutes allowing a set-off or counterclaim to be pleaded in actions at law, and now "courts of equity follow the law, save when peculiar equities intervene." What makes under mutual credits a peculiar equity? Merely mutual demands is not sufficient ground. *Tate v. Evans*, 54 Ala. 16; *Tibble v. Taul*, 23 Ky. (7 T. B. Mon.) 455. If one has a claim against another upon which an action at law can be sustained, it generally cannot be made a set-off in equity. *Hutchins v. Hope*, 7 Gill 119; *Dungan v. Miller*, 19 N. J. Eq. 218; *Pond v. Harwood*, 139 N. Y. 111, 34 N. E. 768.

But the mere right of action at law is not conclusive of there not being the right of equitable set-off. Insolvency of the plaintiff has in and of itself been often made the basis of equitable set-off. *Downs v. Jackson*, 33 Ill. 464, 85 Am. Dec. 289; *Keightley v. Walls*, 24 Ind. 205; *Blackwell v. Oldham*, 34 Ky. 195; *Field v. Oliver*, 43 Mo. 200; *Richardson v. Doty*, 44 Neb. 73, 62 N. W. 254. And the non-residence of plaintiff has similarly been held sufficient to sustain the claim of equitable set-off. *Moss v. Rowland*, 62 Ky. 321; *Fleming v. Russell*, 13 Tex. Civ. App. 558, 36 S. W. 504; *Gregory v. Hasbrook*, 1 Tenn. Ch. 218. But if the set-off should only be allowed in equity only for the two last-named reasons, it does not seem that it ought to be allowed as completely as the principal case allowed it. Thus the principal case applied the principle so as to extinguish interest on an interest-paying demand on the theory of an implied understanding that there was payment on the note during its running. The theory of insolvency or non-residence creating equitable set-off ought not to raise such an understanding.

Independently of insolvency and non-residence it seems that there ought to be circumstances warranting the conclusion that both parties acted upon the understanding that one demand should be applied in liquidation or set-off another. *Raleigh v. Raleigh*, 35 Ill. 512; *Waldrich v. Moll*, 10 Minn. 383; *Caldwell v. Powell*, 65 Tenn. 82. If there is an existing debt on one side constituting a ground of credit on the other, this has been held sufficient for equitable set-off. *Howe v. Sheppard*, Fed. Cas. 6,773, 2 Sumn. 409. But an implied understanding would seem to be difficult thing to be arrived at in some states. Thus, in Missouri it was held in a case where one held the note of an attorney-at-law for \$2,500, and the maker claimed credits of legal services, cash turned over and land transferred to the holder at various times, the court was held to have correctly allowed the note to run from its due date to judgment at the expressed rate of interest with credits in the counterclaim from different dates respectively at the legal rate of interest, which was lower than the contract rate in the note. *Stephens v. Burgess*, 69 Mo. 168. It does

look like the calculation should have been made at least on the theory of partial payments.

This set-off in equity seems in essence to be similar to defenses at common law, in that they attack plaintiff's cause of action and show by virtue thereof that if plaintiff recover at all he should for only a part of his demand, while statutory set-off admits the cause of action.

The implication whereby an equitable set-off arises springs out of mutual demands where they have grown out of the same connected transactions or the one has formed in whole or in part is the consideration of the other, especially when the party against whom the set-off is asserted is insolvent. *Armstrong v. Warner*, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466. This method is called "decreasing the compensation of mutual demands so far as they equal each other."

Insolvency as giving a defendant a standing to invoke the rule in equity, has been often applied against assignees in insolvency, even though the indebtedness on one side had not matured. *Hatch v. Huntington*, 155 N. Y. 401, 55 N. E. 49, 40 L. R. A. 664. Thus also the Federal Supreme Court ruled the precise question being as follows: "Where a national bank becomes insolvent and its assets pass into the hands of a receiver, can a debtor of the bank set-off against his indebtedness the amount of a claim he holds against the bank, supposing the debt due from the bank to have been payable at the time of its suspension, but that due to it to have been payable at a time subsequent thereto?" The court thought this to be within the intention of the assignor and the defendant. Set-off and counterclaim statutes often protect parties the same as if these demands constituted equitable set-offs or common-law defenses, and we see that in the principal case the defense was important merely from the standpoint of interest. If the set-off or counterclaim exceeded the demand of plaintiff or ran at a different and higher rate of interest a defendant might naturally prefer to resort to the statute so as to get judgment for his excess. Or, also, he might be able to resist under some circumstances the establishment of plaintiff's claim more effectually. In the principal case it is seen that equitable set-off better subserved his interest.

The doctrine of equitable set-off has had frequent illustration in non-residence cases. Thus, in the U. S. Supreme Court it was held that a garnishee who occupies the double position of debtor to the principal defendant in an ascertained amount, and his creditor by way of unliquidated damages arising out of breach of contract in existence when the garnishment proceedings were begun, can, after an order at law subjecting the ascertained indebtedness to the garnishment process, procure a restraining order from a court of equity against the garnisheering creditor from enforcing payment until the unliquidated damages can be ascertained and set-off against same, where the principal debtor is insolvent and a non-resident. *North Chicago R. M. Co. v. St. Louis Ore and Steel Co.*, 152 U. S. 596, 38 L. Ed. 565. See also *Quick v. Lemon*, 105 Ill. 578; *Foster v. Cooper*, 88 Ky. 285, 11 S. W. 24. The authorities on the sufficiency of insolvency as affording ground for equitable interference are quite fully considered. Acting on this theory and extending somewhat into the domain of the faith and credit clause of the Constitution

is a late case from Colorado. In this case a non-resident was attempting to enforce a judgment obtained in a foreign jurisdiction. It was held a defendant could set-off his claim for unliquidated damages for defective goods sold by the judgment creditor, but this ruling was avoided in that case by its being shown that the judgment creditor was a foreign corporation fully complying with the laws of the state where the judgment was being tried on, and therefore the defendant was in a position to invoke his legal remedy against the plaintiff. *Plattner Implement Co. v. Bradley, Alderson & Co. (Colo.)*, 90 Pac. 86. The case of *Fowler & Co. v. Bollinger*, 140 Ala. 240, 37 So. 225, is an instance of equitable set-off being allowed, where a claim has been barred at law by limitations. Thus, where there were mutual subsisting debts between two partnerships and the surviving member of one brings a suit against an individual of the other on his joint and several liability, the bar as to the claim of his partnership having attached, so no independent action could be maintained, the court allowed the barred claim to be interposed as an equitable set-off. This relief, however, was upon a statute preventing statute of limitations running against mutual demands as long as either claim was enforceable. To allow the set-off in favor of the partner sued was in the way of avoiding circuitry of action, and because there was here a special equity. A number of cases are cited in the opinion in this case. This last case shows that an unfair advantage could not be allowed thus to misuse the joint and several liability clause in partnership contracts. A limit of the rule of equitable set-off cannot be well stated, but the cases we have cited are merely illustrative and seem to prove, that while statutes regulating these matters greatly change the common law, yet, if they cannot be resorted to so as to fully protect a defendant, who is without laches of any kind in his just rights, equity will protect him.

N. C. COLLIER.

JETSAM AND FLOTSAM.

CONCURRENCE OF NEGLIGENCE WITH AN ACT OF GOD.

In *Brown v. West Riverside Coal Co.*, in the Supreme Court of Iowa (April, 1909, 120 N. W. 732), it was held that where the negligence of a responsible person concurs with an act of God in producing an injury, such person is liable for the consequences, provided the injury would not have happened but for his failure to exercise ordinary care.

This question has most frequently been raised in cases where a carrier's delay in forwarding merchandise subjects it to destruction or injury by a freshet or storm which would have been escaped if the carrier had done its duty. A very serious judicial controversy exists as to whether or not the carrier may be held liable. It is argued, on the one hand, that an act of God is the proximate cause of the injury, and therefore that the human agent indirectly responsible cannot be held. The logic of this position is unassailable under the orthodox doctrine of proximate and remote causes. On the other

hand, the result of exonerating a person who really was at fault simply because an act of God intervened is so improper and unjust that most of the courts in which the question has been raised as a new one during recent years have followed the doctrine of New York. *Michaels v. N. Y. C. & C., R.*, 30 N. Y. 564; *Read v. Spaulding*, id., 630. The question is discussed and authorities on both sides collated in an article on "Negligence and the Act of God" in the *Yale Law Journal* for March, 1909.

In this recent Iowa case the accident causing the death of plaintiff's intestate was an explosion of dynamite and gun-powder, probably caused by a stroke of lightning. The negligence of the defendant consisted in keeping the explosives in a shanty where there was also a telephone and its appliances, and where, furthermore, workmen were accustomed to gather and leave their clothing and eat their lunches, as it was the only place of shelter provided for them. On the contention that the lightning was an independent cause which exonerated the defendant from liability, the court said:

"Nor are we able to say that if the explosives were discharged by an electric bolt entering the building it demonstrates the intervention of an independent agency which breaks the line of causation from defendant's negligent act and renders the death of the deceased so clearly accidental or providential that no right of recovery exists. This feature of the case presents a question upon which there is much confusion in the authorities, and decisions may readily be found that where some uncontrollable manifestation of nature unites with human negligence in causing injury to persons or property, the negligence of the human agent is treated as a condition and not a cause of the injury, and relieves him from legal liability. The origin of this rule is hinted at in the ancient formula by which every destructive exhibition of the laws of nature was denominated 'an act of God,' from which idea it was easy to reach the pious conclusion that an injury which had been caused or contributed to by the hand of God ought not to be made the basis for the recovery of damages before human tribunals; but this theory has been discarded by many courts, and among them is our own. The subject was treated with great thoroughness by Mr. Justice McClain in *Shoe Co. v. Railroad Co.*, 130 Iowa, 123, 106 N. W. 498, 5 L. R. A. (N. S.), 882, and by Mr. Justice Demer in *Vyse v. Railroad Co.*, 126 Iowa, 90, 101 N. W. 736. The rule is there laid down that when negligence of a responsible person concurs with a flood or storm or other so-called 'act of God' in producing an injury, the party guilty of such negligence will be held liable for the injurious consequences if the injury would not have happened but for his failure to exercise care. These precedents are of such recent date and treat the subject so exhaustively that we need not here reopen the discussion farther than to say we are still satisfied with the legal and logical soundness of the rule there announced. That a person whose negligence is the primary cause is not excused because a stroke of lightning intervenes to precipitate an injury see *Jackson v. Telephone Co.*, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101. The general subject of proximate cause and intervening agencies in cases of negligence is also treated quite fully in *Burk v. Creamery Package Co.*, 126 Iowa, 730, 102 N. W. 793, 106 Am. St. Rep. 377; *Fishburn v. Railroad Co.*, 127 Iowa, 483, 103 N. W. 481; *Phinney v.*

Railroad Co., 122 Iowa, 488, 98 N. W. 358; Gould v. Schermer, 101 Iowa, 588, 70 N. W. 697."

The doctrine of the Iowa cases is practically to be preferred to that of the Supreme Court of the United States in *Railroad Co. v. Reeves*, 10 Wall. 176, and the Supreme Judicial Court of Massachusetts in *Denny v. N. Y. C. & C., R. R.*, 13 Gray, 481, exonerating the negligent person. The proper course is to make a special exception to the ordinary doctrine of proximate and remote causes where an "act of God" occurs in conjunction with negligence.—New York Law Journal.

BOOK REVIEWS.

WILLISTON ON SALES.

The author of this work, Mr. Samuel Williston, is also such of the Uniform Sales Act, the draft of which was finally adopted by the commissioners for uniform state laws in 1906. Five states, New Jersey, Connecticut, Massachusetts, Rhode Island and Ohio and Arizona enacted this law and anticipating and seeking to promote, its extension to other states, Prof. Williston has produced the above work. In pursuit of his purpose he has prepared both a commentary on the Sales Act and a treatise on sales under the common law. To practitioners in states where the Uniform Sales Act has become a statute, this book would appear to be almost a necessity, and it is besides excellent as a work on the subject of sales in a general aspect. The treatment and discussion of the sales act sections make a plan quite logical, because the act itself has its sections following in such order and the entire book should be generally useful.

Printed in one volume of 1,300 pages, bound in buckram, and published by Little, Brown & Co., Boston, Mass.

JOYCE ON INJUNCTIONS.

This work, by Howard C. Joyce, of New York City, is one of the ambitious, if we may so term it, works of its day. It is in two large volumes containing 2,000 pages, with a third volume of over 400 pages, devoted to table of cases and index. The law of injunctions has received under modern conditions, much important extension. Its application to such things as strikes, boycotts, conspiracies, monopolies, regulation of rates, revocations of licenses and franchises, etc., etc., brings forward a great amount of late adjudication in federal and state courts, and even an intelligent grouping of these cases would be of much value. When, however, the author of this book does more than this in discussion of underlying principles, tracing distinctions and preserving logical arrangement in such a mass of precedents he makes the profession and the courts his debtors. There is a vast deal of decision in injunction matters and our digests often help to intensify or emphasize their confusing tendency. The author, who may help to lead us through the wilderness of this precedent is a benefactor.

We have little doubt this author has attained much success in this effort.

These volumes are in buckram and from the publishing house of Matthew Bender & Company, Albany, N. Y. 1909.

NEWS ITEM.

MORITZ ROSENTHAL.

Only 41 years old, and in receipt of one of the largest incomes enjoyed by any lawyer in the United States—that's Moritz Rosenthal, once of Chicago, now of New York, Standard Oil attorney.

Rosenthal gets \$100,000 a year as a retainer from the Standard for defending the trust against the attacks of the federal government. When actively engaged in trial work, such as the present ordeal of John D. Rockefeller and John D. Archbold, Rosenthal is rewarded, it is reported, at the rate of \$1,000 per day.

This rather well-paid young man was born at Dixon, Ill., and is a graduate of the University of Michigan, class of '88. Early in his legal career he was an assistant United States attorney in Illinois, and fought the very trusts he is now defending. As a state attorney, he cleared Chicago of a holdup epidemic, sending some twenty thugs to the pen. He next attained some note, but little public esteem, by serving as attorney for the owners of the Iroquois theater, and saving them from the penitentiary after the fire which destroyed 500 human lives.

His first big case as a trust lawyer was the defense of the Chicago packers against the federal government. Soon after he became associated with the Standard Oil Company, and he was one of the attorneys in the case in which Judge Landis assessed the \$29,000,000 fine which didn't stick. He is also one of the counsel for defendant in the famous suit now pending whereby the United States government seeks to have the Standard Oil Co. declared a monopoly and its compact organization broken up into its constituent companies.

HUMOR OF THE LAW.

The evidence had shown that the brick which a careless workman had dropped from a scaffolding twenty feet above the surface of the ground had fallen on a man's shoulder and broken a bone, but the jury decided that the victim had no cause of action—the falling of the brick had no necessary connection with the accident.

"Gentlemen," said the judge, "I never heard of such a verdict. You utterly ignore the existence of the law of gravitation."

"That law, your honor," answered the foreman of the jury, "is so old that we decided not to consider it. It's obsolete."

They were trying an Irishman, charged with a petty offense in an Oklahoma town, when the judge asked:

"Have you any one in court who will vouch for your good character?"

"Yis, your Honor," quickly responded the Celt, "there's the sheriff there."

Whereupon the sheriff evinced signs of great amazement. "Why, your Honor," declared he, "I don't even know the man!"

"Observe, your Honor," said the Irishman, triumphantly, "observe that I've lived in the county for over twelve years an' the sheriff doesn't know me yit! Ain't that a character for ye?"—Harper's Weekly.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of
ALL the State and Territorial Courts of Last
Resort and of all the Federal Courts.

Alabama.....	3, 5, 10, 22, 72, 85, 110
Arkansas	64, 94
California	70, 112
Dist. of Col.	11, 12
Florida	28, 38, 46, 93, 99
Georgia	4, 8, 44, 58
Illinois.....26, 34, 39, 42, 49, 61, 67, 68, 84, 87, 92, 113	
Indiana.....	19, 57
Iowa	21, 27, 106
Kentucky.....	53, 55, 78, 103, 104, 109
Louisiana	90
Massachusetts.....	101
Michigan	1, 89
Minnesota	65, 69, 76
Mississippi	60
Missouri	25, 81
Nevada	17, 98
New Mexico	52
New York.....	36, 56, 59, 77, 102
Ohio	54
Oklahoma	35, 43, 45
Oregon	24, 80
South Carolina	50, 114
South Dakota	40
Texas.....2, 6, 18, 20, 23, 29, 41, 47, 51, 63, 75, 105	
United States C. C.....	37, 100, 115
U. S. C. C. App.....	13, 30, 74, 88, 96, 107, 108
United States D. C.....	14, 15, 16, 62
United States S. C.....	7, 32, 33, 79
Utah	9, 31, 48, 91, 95
Virginia	66, 111
Washington	71, 73, 82, 86
Wisconsin	83, 97

1. **Accord and Satisfaction**—Consideration.—A payment of a debt due by services, the value of which, and the compensation to be paid for which, were left to be settled by agreement, was not invalid as without consideration.—*Muir v. Kalamazoo Corset Co., Mich.*, 119 N. W. 589.

2. **Adverse Possession**—Tenant at Sufferance.—A purchaser, or one claiming under him entering into possession of land under a contract of purchase, held a tenant at sufferance, and, so long as the title of the vendor is recognized, limitations do not run against the vendor.—*Glenn v. Rhine, Tex.*, 115 S. W. 91.

3.—**Vendor and Purchaser**—Possession under an agreement to pay notes before the vesting of title in the maker held not adverse, and to give rise to no presumptive right.—*Rankin v. Dean, Ala.*, 47 So. 1015.

4. **Animals**—Right to Kill.—An owner of sheep attacked by a dog may, without liability for cruelty to animals, cause it to be killed, even after it has escaped from where it attacked the sheep.—*Miller v. State, Ga.*, 63 S. E. 571.

5. **Appeal and Error**—Parties.—The objection that the sureties on defendant's appeal bond from the justice's to the circuit court should have joined in the appeal to the supreme court was waived by a submission on the merits.—*Shepherd v. Parker, Ala.*, 47 So. 1027.

6.—**Remittitur**—One against whom judgment was rendered below after entry of remittitur cannot complain that the remittitur was made below, instead of in the court of civil appeals.—*Galveston, H. & S. A. Ry. Co. v. Henefy, Tex.*, 115 S. W. 57.

7.—**Submitting the Question of Custom to Jury**—Submitting the question of the existence of a custom to use coal oil in kindling fires held not prejudicial error, where the court may take judicial notice of such fact.—*Waters-Pierce Oil Co. v. Deselms, U. S. S. C.*, 29 Sup. Ct. 270.

8. **Assault and Battery**—What Constitutes.—Where a threat or menace is accompanied by an apparent attempt to commit an injury, the consummation of which is prevented, the assault held complete.—*Rutherford v. State, Ga.*, 63 S. E. 570.

9. **Attachment**—Construction of Statute.—Attachment statutes are to be liberally construed to effect their purpose, but, where a failure to observe a statutory requirement constitutes a jurisdictional defect, the courts cannot disregard it.—*Cole v. Utah Sugar Co., Utah*, 99 Pac. 681.

10. **Attorney and Client**—Termination of Relation.—Acquiescence by a member of a firm of attorneys in the abandonment of a case by the senior member for over five years held to ratify such abandonment.—*Troy v. Hall & Farley, Ala.*, 47 So. 1035.

11. **Bail**—Right to Bail.—A prisoner indicted for crime in one federal district and apprehended in another, who, after hearing has been ordered removed for trial, is not entitled as a matter of right to be admitted to bail.—*Ex parte Green, U. S. D. C.*, S. D. N. Y., 165 Fed. 557.

12. **Bankruptcy**—Involuntary Proceedings.—A resolution by the stockholders of a corporation, authorizing the Board of Directors to sell the property of the corporation and pay its debts, held not a general assignment, which constituted an act of bankruptcy.—*In re Hartwell Oil Mills, D. C., U. S. D. C., W. D. Ga.*, 165 Fed. 555.

13.—**Involuntary Proceedings**—Where the claim of a petitioning creditor was provable when the petition was filed for an amount exceeding \$500, it was immaterial that thereafter the creditor became liable to the bankrupt's assignee for the benefit of creditors because of a wrongful attachment.—*In re Bevin, U. S. C. C. of App., Second Circuit*, 165 Fed. 434.

14.—**Jurisdiction of Courts**—A custodian of property in effect pledged by a bankrupt to obtain the release of an attachment on the property of another is an adverse claimant, and a

court of bankruptcy is without jurisdiction to determine his rights summarily without his consent.—*In re Squier*, D. C., U. S. D. C., E. D. N. Y., 165 Fed. 515.

15.—**Proceedings Against Corporations.**—Where a corporation, at the time it was adjudicated a bankrupt, was not and had never been principally engaged in any business which, under the statute, rendered it subject to such adjudication, the court was wholly without jurisdiction to make the same; and such lack of jurisdiction cannot be cured by laches, waiver, or estoppel, but the proceedings must be dismissed.—*In re New England Breeders' Club*, U. S. D. C., D. N. H., 165 Fed. 517.

16.—**Violation of Order.**—A creditor of a bankrupt, enjoined by the court of bankruptcy from prosecuting an action against the bankrupt, is subject to punishment for contempt for violation of such order.—*In re Mustin*, U. S. D. C., N. D. Ala., 165 Fed. 506.

17. **Banks and Banking.**—Insolvency. — The purpose of statutes making it a crime to receive deposits when a bank is known to be insolvent is not only to protect depositors, but also to promote careful banking methods.—*Ex parte Pittman*, Nev., 99 Pac. 700.

18. **Benefit Societies.**—Construction of Policy. —The word "killed," as used in the constitution of a benefit association, held to refer to death of a member, and not to the accident or cause of death.—*Roth v. Travelers' Protective Ass'n of America*, Tex., 115 S. W. 31.

19.—**Limiting Time to Bring Action.**—A provision in an insurance policy, limiting the time to sue thereon to less than fixed by the statute of limitations, is valid, unless forbidden by statute.—*Caywood v. Supreme Lodge of Knights & Ladies of Honor*, Ind., 86 N. E. 482.

20. **Bills and Notes.**—Consideration.—Rev. St. 1895., art. 314, held to put negotiable and non-negotiable notes on the same basis as to the defenses of want or failure of consideration, as against a bona fide holder.—*McCormick v. Kampmann*, Tex., 115 S. W. 24.

21. **Brokers.**—Commissions.—A contract with a real estate broker held not to make the owner liable for the commission on his selling the premises to a purchaser procured by himself.—*Tracy v. Radeke*, Iowa, 119 N. W. 525.

22.—**Commissions.**—Where real estate brokers were interrupted in their negotiations for a sale of the property by the request of the landowner to hold the proposition for a few days, and during such few days, without terminating the agency, the owner continued the negotiations along the same line and concluded the sale, the brokers are entitled to their commissions.—*Hutto v. Stough & Hornsby*, Ala., 47 So. 1031.

23.—**Commissions.**—Where the agent is the efficient cause of the sale of property, he is en-

titled to compensation, though the principal himself negotiates the sale.—*Peach River Lumber Co. v. Montgomery*, Tex., 115 S. W. 87.

24.—**Employment.**—Where defendant received an inquiry from a real estate broker as to the price of land and made a certain price to the broker, less commissions, the acceptance thereof by the broker made him defendant's agent for the sale of the land.—*Rodman v. Manning*, Or., 99 Pac. 657.

25. **Carriers.**—Contributory Negligence.—A passenger held charged with knowledge of the danger of standing in the aisle of a coach while the engine was switching, so as to prevent recovery for injuries received from a collision of the cars while in such position.—*Gabriel v. St. Louis, I. M. & S. Ry. Co.*, Mo., 115 S. W. 3.

26. **Charities.**—Gift Causa Mortis.—A gift causa mortis to a priest for masses for the repose of the donor's soul is valid as a charitable gift.—*Gilmore v. Lee*, Ill., 86 N. E. 568.

27. **Carriers.**—Live Stock.—A carrier of live stock is liable for the results of any negligence to which it contributes, though its conduct may not have been the sole cause of the injury.—*Wisecarver & Stone v. Chicago, R. I. & P. Ry. Co.*, Iowa, 119 N. W. 532.

28.—**Penalties.**—Penalties may be incurred by a carrier under the railroad commission law, but it does not provide a penalty for a mere refusal to pay a liability imposed by a rule of the Railroad Commission.—*State v. Atlantic Coast Line R. Co.*, Fla., 47 So. 969.

29.—**Regulation of Rates.**—The State Railroad Commission cannot authorize railroads to disregard the provisions of Rev. St. 1895, art. 4574, and subdivision 1, prohibiting unjust discrimination in charges.—*Railroad Commission of Texas v. Galveston Chamber of Commerce*, Tex., 115 S. W. 94.

30.—**Who Are Passengers.**—Neither the master mechanic of a railroad, nor a conductor, nor an engineer of a train, has any implied authority to agree on behalf of the company to carry a person on such train without payment of fare.—*Clark v. Colorado & N. W. R. Co.*, U. S. C. C. of App., Eighth Circuit, 165 Fed. 408.

31.—**Res Ipsa Loquitur.**—That a door closed upon a passenger's hand held not to show prima facie negligence of the carrier.—*Christensen v. Oregon Short Line R. Co.*, Utah, 99 Pac. 676.

32. **Clerks of Courts.**—Per Diem Compensation.—A clerk of the Federal court held entitled to his statutory per diem compensation for days on which he refers to the referee in bankruptcy voluntary petitions filed during the absence of the judge from the district.—*United States v. Marvin*, U. S. S. C., 29 Sup. Ct. 297.

33. **Constitutional Law.**—Due Process in Tax Proceedings.—Tax proceedings resulting in a tax sale under which property marked reserved on an official plat was described as certain num-

bered blocks, not designated on the plat, but which would have borne such numbers if the tract reserved had been divided, held not to deprive the owner of his property without due process of law.—*Ontario Land Co. v. Yordy*, U. S. S. C., 29 Sup. Ct. 278.

34.—**Local or Special Law.**—*Hurd's Rev. St.* 1905, c. 37, sec. 300, authorizing a municipal court judge to charge the jury orally or in writing, held not invalid as a delegation of legislative power to the judge.—*Morton v. Pusey*, Ill., 86 N. E. 601.

35.—**Amendment of Constitution.**—A proposition to amend the constitution and another for the approval or rejection of an act or the repeal of the same cannot be united so as to have one expression of the voter answer both propositions.—*Lozier v. Alexander Drug Co.*, Ok., 99 Pac. 808.

36. **Corporations—Liability on Lease.**—A corporation held liable on a lease, though the lease was in furtherance of a monopoly and executed by the president of the lessor corporation, as the president was acting adversely to the interests of the lessor, so that his wrongful purpose cannot be imputed to the lessor.—*Brooklyn Distilling Co. v. Standard Distilling & Distributing Co.*, N. Y., 86 N. E. 564.

37. **Courts—Actions Against Receiver.**—A federal court has the sole right to control the disposition of property and the distribution of funds in the hands of its receivers, and will not permit an execution from a state court to be levied thereon.—*Pennsylvania Steel Co. v. New York City Ry. Co.*, U. S. C. C., S. D. N. Y., 165 Fed. 471.

38.—**Federal Questions.**—The legality of classification may be determined with reference to the due process of law clause of the State Constitution; but, as such determination involves a federal question, decisions of the Supreme Court of the United States control.—*Seaboard Air Line Ry. v. Simon*, Fla., 47 So. 1001.

39.—**Jurisdiction of Municipal Courts.**—The Legislature has no power to so change the jurisdiction of or practice in municipal courts that it could no longer be regarded as a municipal or city court.—*Morton v. Pusey*, Ill., 86 N. E. 601.

40. **Criminal Evidence—Judicial Notice.**—Judicial notice may be taken that the ordinary shotgun is a dangerous weapon when fired at the distance of fifty-seven steps.—*State v. Sutherland*, S. D., 119 N. W. 548.

41.—**Homicide.**—Evidence that accused, armed with a gun, fired shots while on a public road on his way to the house where he killed decedent, was inadmissible.—*Holland v. State*, Tex., 115 S. W. 48.

42.—**Uncorroborated Testimony of Accomplices.**—The rule that the uncorroborated testimony of accomplices is insufficient to sustain a

conviction does not obtain in Illinois.—*People v. Feinberg*, Ill., 86 N. E. 584.

43. **Criminal Law—Homicide.**—Anger or voluntary intoxication will not prevent a homicide from being murder if defendant was able to form a design to effect death.—*Morris v. Territory*, Ok., 99 Pac. 760.

44.—**Opinions.**—Mere hearsay, unless a witness is testifying as an expert, has no more probative value as a basis of opinion than ordinarily attaches to hearsay.—*Caswell v. State*, Ga., 63 S. E. 566.

45. **Criminal Trial—Instructions.**—Where in the same affray, a defendant, by separate shots, kills two persons, and has been acquitted for the murder of the first, and is upon trial for the murder of the second, instructions as to effect of such acquittal held necessary.—*Morris v. Territory*, Ok., 99 Pac. 760.

46. **Damages—Liquidated Damages.**—Where contract provides for stipulated damages on failure to complete the contract within a specified time, they are not recoverable for refusal to perform.—*Moses v. Autuono*, Fla., 47 So. 925.

47.—**Loss of Earning Power.**—A railway brakeman in line for promotion to a conductorship, suing for personal injury, may show what a conductor earns on the question of loss of future earning capacity.—*Missouri, K. & T. Ry. Co. of Texas v. Lasater*, Tex., 115 S. W. 103.

48.—**General and Special Damages.**—The only difference between general and special damages is that general damages are the necessary and usual result of the acts described in the complaint, while the special damages need not be, but must only be the proximate result of and traceable to such acts.—*McKinney v. Carson*, Utah, 99 Pac. 660.

49. **Drains—Assessments.**—A drainage assessment held not objectionable because the commissioners who levied it were landowners within the district.—*People v. Schwank*, Ill., 86 N. E. 631.

50. **Eminent Domain—Appropriation Without Condemnation.**—A statute authorizing a water company to condemn land for the erection of a dam imposed no new liability, and did not preclude punitive damages.—*Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co.*, S. C., 63 S. E. 548.

51.—**Assessment for Benefits.**—Under the Constitution, a city held not entitled to collect an assessment for benefits resulting from a street improvement without showing that adequate compensation will be made for the assessment, by showing that the improvement will be put in within a reasonable time.—*City of Austin v. Nalle*, Tex., 115 S. W. 26.

52. **Estoppel—Inconsistent Positions.**—Where plaintiff seeks to establish his ownership to land by adverse possession, he thereby disclaims the holding of possession as a tenant or licensee;

the two positions being inconsistent and not maintainable at the same time.—*Chaves v. Tortina*, N. M., 99 Pac. 690.

53. **Evidence**—*Res Gestae*.—Declarations of the conductor in charge of the car which struck a pedestrian, admonishing the motorman not to make any statement, held inadmissible as a part of the *res gestae*.—*Louisville Ry. Co. v. Johnson's Adm'r*, Ky., 115 S. W. 207.

54. **Executors and Administrators**—Allowances.—An allowance to an administrator for special services cannot take effect, as to others interested in the settlement who have not had notice, until the court after legal notice acts upon the settlement account itself.—*McMahon v. Ambach & Co.*, Ohio, 86 N. E. 512.

55.—**Claims Against Decedent's Estate**.—Relationship of stepson-in-law and step-mother-in-law held too remote to raise presumption that services rendered one by the other while living together were gratuitous, so that no stricter proof was required than in ordinary cases to establish a contract to pay for the services.—*Hardiman's Adm'r v. Crick*, Ky., 115 S. W. 236.

56. **Food**—Certification of Milk.—Agricultural Law (Laws 1893, p. 661, c. 338), as amended by Laws 1904, p. 1380, c. 566, sec. 22, providing that milk shall not be sold as certified milk, unless it is conspicuously marked with the name of the "association" certifying it, is invalid, in that it fails to designate the association by which the certification is to be made.—*People v. Briggs*, N. Y., 86 N. E. 522.

57. **Frauds, Statute of**—Debt of Another.—Where a grantee of mortgaged premises assumes the mortgage debt as a part of the consideration for his deed, his liability is based on an original promise, and is not an obligation to pay the debt of another.—*Southern Indiana Loan & Savings Inst. v. Roberts, Ind.*, 86 N. E. 490.

58.—**Memorandum**—Statute of frauds held to contemplate that a contract as against the party to be charged shall be evidenced by a writing signed by him.—*Capital City Brick Co. v. Atlanta Ice & Coal Co.*, Ga., 63 S. E. 562.

59. **Game**—Sale of Foreign Game.—Forest, Fish and Game Law (Laws 1900, p. 29, c. 20), sec. 27, as amended by Laws 1905, p. 611, sec. 335, construed, and held, that one selling grouse in the State taken outside of the State does not violate the act, though he has not given the bond prescribed by the statute.—*People v. Weinstein*, N. Y., 86 N. E. 547.

60. **Garnishment**—Proceedings to Procure.—One indebted to a non-resident cannot deposit the amount due in a bank, in defiance of his creditors wishes, for the purpose of conferring jurisdiction in attachment on the court where the bank is located.—*Saxony Mills v. Wagner & Co.*, Miss., 47 So. 899.

61. **Gifts**—Undue Influence.—A gift causa mor-

tis by a parishioner to her priest is *prima facie* void, and the burden of proof rests on such priest to show that the gift was not the result of undue influence.—*Gilmore v. Lee*, Ill., 86 N. E. 568.

62. **Habeas Corpus**—Stay Pending Appeal.—A person indicted for a crime in one federal district and apprehended in another, who has had a full hearing before a commissioner and has been ordered removed for trial, is not entitled as a matter of right to be admitted to a stay on appeal from a decision denying him a discharge in habeas corpus.—*Ex parte Green*, D. C., U. S. D. C., S. D. N. Y., 165 Fed. 557.

63. **Homicide**—Shooting Third Person.—Where one shooting at another with malice kills a third person, the killing is only murder in the second degree, though the killing of the person intended might have been murder in the first degree.—*Holland v. State*, Tex., 115 S. W. 48.

64. **Husband and Wife**—Alienation of Wife's Affections.—A parent cannot be held liable for alienation of a wife's affections unless acting from improper motives.—*Boland v. Stanley*, Ark., 115 S. W. 163.

65. **Infants**—Contract of Insurance.—An infant, entering into a fair contract of life insurance which is partly executed, cannot, on coming of age, repudiate the same and recover premiums paid, where the benefits are such that they cannot be restored.—*Link v. New York Life Ins. Co.*, Minn., 119 N. W. 488.

66. **Insane Persons**—Removal of Trustee.—The trustee of an incompetent was properly removed, where it was shown on a bill for that purpose that he failed to make suitable provisions for the comfortable maintenance of his ward.—*Hawley v. Watkins*, Va., 63 S. E. 560.

67. **Interest**—Claims Against Municipality.—A contractor's right to interest on funds collected from a special assessment and wrongfully withheld by the city, accrues on the due date of special assessment bonds held by him.—*Conway v. City of Chicago*, Ill., 86 N. E. 619.

68. **Intoxicating Liquors**—Place of Sale.—Place of contract of sale of liquor held to be in "wet" territory, though the order is by telephone from "dry" territory.—*People v. Young*, Ill., 86 N. E. 589.

69.—**Social Clubs**.—A social organization or club incorporated under the laws of the state is a "person" within Rev. Laws 1905, sec. 1519, providing that any person selling liquor without a license in certain quantities, to be drunk on the premises, is guilty of a misdemeanor, etc.—*State v. Minnesota Club*, Minn., 119 N. W. 494.

70. **Limitation of Actions**—Having Means of Knowledge.—Where no duty is imposed by law on one to make inquiry, the mere fact that means of knowledge are open to him, and he did not avail himself of it, held not to bar him of relief, when making actual discovery.—*Hart v. Walton*, Cal., 99 Pac. 719.

71.—**Maturity of Debt**.—A clause in a mortgage giving the mortgagee the right to declare the whole debt due on default in pay-

ment of interest and a breach thereof does not make the mortgage due for the purpose of starting the running of the statute of limitations.—Weinberg v. Naher, Wash., 99 Pac. 736.

72. **Landlord and Tenant**—Unlawful Detainer.—Where during the term leased premises were sold by the landlord, he was the proper person to demand delivery of possession as a condition precedent to an action of unlawful detainer.—Shepherd v. Parker, Ala., 47 So. 1027.

73. **Master and Servant**—Competency of Servant.—A master, employing an incompetent servant through a union organized to furnish experienced labor in that line of employment, held liable to a fellow servant for injuries caused by such incompetent servant.—Pearson v. Alaska Pac. S. S. Co., Wash., 99 Pac. 753.

74.—Duty to Fence Railroad Tracks.—Neither at common law nor under Acts Tenn. 1891, p. 220, c. 101, secs. 2, 3, is any duty imposed on a railroad company to its employees to fence its track; and its failure to fence does not render it liable for the death of an engineer killed in a collision with live stock on the track.—Gill v. Louisville & N. R. Co., U. S. C. C. of App., 165 Fed. 438.

75.—Excessive Speed of Train.—A railway company is liable for injury to a brakeman proximately caused by running its train at a dangerous rate of speed, though such speed be not unlawful.—Missouri, K. & T. Ry. Co. of Texas v. Lasater, Tex., 115 S. W. 103.

76.—Injury to Minor Employee.—Where a boy employed in a sawmill sat down for a short time to rest, and was injured by the machinery, he did not depart at the time from the scope of his employment.—Jacobson v. Merrill & Ring Mill Co., Minn., 119 N. W. 510.

77.—Safe Place to Work.—A street surface railroad company operating its cars singly does not owe its employes the duty of using only cars with platforms at either end if the same height above the track, or with buffers to guard against injury from collisions.—Durkee v. Hudson Valley Ry. Co., N. Y., 86 N. E. 537.

78.—Safe Place to Work.—The duty of a master to furnish reasonably safe appliances and reasonably safe places is confined to the appliances and places with which the servant is required to work.—Harper v. Illinois Cent. R. Co., Ky., 115 S. W. 198.

79. **Monopolies**—Right to Recover on Monopolistic Contract.—A recovery on an account for goods sold and delivered by a corporation created to effectuate a combination of wall-paper manufacturers, in violation of Anti-Trust Act, cannot be had where the account is made up with direct reference to the agreements constituting the illegal combination.—Continental Wall Paper Co. v. Louis Voigt & Sons Co., U. S. S. C., 29 Sup. Ct. 280.

80. **Municipal Corporations**—Assessments for Sewers.—Where a city is authorized to assess the cost of constructing sewers on property benefited, the property can be assessed for the improvement, though it is nonabutting property and no laterals have been laid to it.—Beckett v. City of Portland, Ore., 99 Pac. 659.

81.—Defective Streets.—A city, issuing a permit to a telephone company for leave to replace a telephone pole at a particular place, held chargeable with knowledge of a depression occasioned by the sinking of the earth following the setting of the new pole.—Merritt v. Kinloch Telephone Co., Mo, 115 S. W. 19.

82.—Defective Streets.—A traveler injured by an obstruction in a city street held not negligent as a matter of law, because he passed the obstruction in the morning of the day of the accident, and saw or should have seen it.—Apker v. City of Hoquiam, Wash., 99 Pac. 746.

83.—Sinking Fund.—The sinking fund of a city is a proper offset against the existing bonds to payment of which it is pledged, under the constitutional provision limiting the indebtedness of the city.—City of Eau Claire v. Eau Claire Water Co., Wis., 119 N. W. 555.

84.—Wrongful Diversion of Funds.—A city which has wrongfully diverted funds collected from a special assessment is liable to the person entitled to the funds as for money had and received.—Conway v. City of Chicago, Ill., 86 N. E. 619.

85. **Negligence**—Setting Out Fire.—Mere proof of damage or destruction of property by a fire set out by another does not of itself authorize an inference of the other's negligence, except where it is set out by locomotives and possibly other agencies of like power and utility.—Robinson v. Cowan, Ala., 47 So. 1018.

86. **Notice**—Constructive Notice.—A party cannot plead ignorance of a public record, to which he has access, and which affords him information necessary to obtain positive knowledge of the fact.—Sumpter v. Burnham, Wash., 99 Pac. 752.

87. **Partnership**—Accounting.—Where the partnership books and accounts are in such a state of uncertainty as to render it a mere matter of conjecture as to whether anything is due from one partner to another, a bill for an accounting will be dismissed.—Donaldson v. Donaldson, Ill., 86 N. E. 604.

88. **Principal and Agent**—Authority of Agent.—Authority to an agent to negotiate for and purchase real estate does not render statements or declarations made by the agent after the deed has been delivered and recorded binding on the principal.—Woolsey v. Haynes, U. S. C. C. of App., Eighth Circuit, 165 Fed. 391.

89.—Extra Compensation.—A servant employed at a fixed salary or rate cannot recover extra compensation for additional duties imposed on him in the absence of agreement or custom.—Muir v. Kalamazoo Corset Co., Mich., 119 N. W. 589.

90. **Principal and Surety**—Discharge of Principal.—That one or more of the sureties chose to accept from the principal less than the full amount in satisfaction of their claims against him held not to render the discharge of the principal void.—State v. Reid, La., 47 So. 912.

91. **Public Lands**—Right to Possession.—The purchaser of land selected by the State under its enabling act held entitled to exclusive possession as against an intruder until the National Government asserts its superior rights, the State's selection being set aside.—McKinney v. Carson, Utah, 99 Pac. 660.

92. **Railroads**—Obstruction of Streets.—A railway company obstructing the streets of a city by its cars in violation of law is negligent in so doing as a matter of law.—Houren v. Chicago, M. & St. P. Ry. Co., Ill., 86 N. E. 611.

93. **Release**—Consideration.—A mere promise of one partner to pay the firm debts is no consideration for the release of another partner equally bound.—Ray v. Pollock, Fla., 47 So. 940.

94. **Sales**—Breach of Contract.—Where the

buyer failed to make payments on shipments of lumber according to contract, the seller does not break the contract on his part by refusing to make further shipments until past-due payments are made.—*Harris Lumber Co. v. Wheeler Lumber Co.*, Ark., 115 S. W. 168.

95.—**Voluntary Payment by Garnishee.**—Where a garnishee, not obliged to pay garnished funds in his hands because no writ of garnishment was issued or served, nevertheless paid the amount into court, the payment was voluntary, and afforded the garnishee no protection as against the real owner, who was not the judgment debtor.—*Cole v. Utah Sugar Co.*, Utah, 99 Pac. 681.

96. **Shipping.**—**Contracts of Affreightment.**—A shipper held entitled to recover freight paid on cargo not carried as required by the contract, and also damages for failure to carry it, notwithstanding the acceptance, under protest, of a bill of lading covering such part of the cargo.—*Equi Valley Marble Co. v. Becker*, U. S. C. C. of App., Second Circuit, 165 Fed. 437.

97. **Specific Performance.**—**Purchase of Waterworks by City.**—A contract whereby a city granted a water company the right to construct waterworks held not too unreasonable to be specifically enforced because thereunder the city reserved the right to purchase the works at any time, without a corresponding right on the part of the company to enforce a sale.—*City of Eau Claire v. Eau Claire Water Co.*, Wis., 119 N. W. 555.

98. **Statutes.**—**Constitutionality.**—Act March 29, 1907 (St. 1907, p. 414, c. 189), making it a crime to receive bank deposits knowing the bank to be insolvent, is not unconstitutional as being a special law for the punishment of offenses.—*Ex parte Pittman*, Nev., 99 Pac. 700.

99.—**Expression of Subject in Title.**—Where the subject embraced in the body of an act is less comprehensive than, but is included in, the subject expressed in the title, the constitutional requirement that a law shall embrace but one subject, etc., is not violated.—*Seaboard Air Line Ry. v. Simon*, Fla., 47 So. 1001.

100. **Street Railroads.**—**Consent of Property Owners.**—The consent of the owners of property abutting on a street to the extension of the line of a street railroad company thereon does not bind the company to continue a system of transfers with another company then existing, where no such condition is expressed therein.—*Central Trust Co. v. Third Ave. R. Co.*, U. S. C. C., S. D. N. Y., 165 Fed. 494.

101.—**Rights of Passengers.**—**An Interurban street railway company held not absolutely bound to carry a passenger to a particular town.**—*Sullivan v. Old Colony St. Ry. Co.*, Mass., 86 N. E. 511.

102.—**Special Charters.**—**A special charter to a street railway company when accepted and acted upon by the company, becomes a contract.**—*City of New York v. New York City Ry. Co.*, N. Y., 86 N. E. 565.

103. **Taxation.**—**Diversion of Fund.**—The funds collected by taxation for the maintenance of a state lunatic asylum cannot be diverted to pay judgments for injuries to inmates inflicted by employees.—*Ketterer's Adm'r v. State Board of Control*, Ky., 115 S. W. 200.

104.—**Inheritance Tax.**—**The act of imposing inheritance taxes makes no exception in favor of either legatees who may be indebted to the estate, or charitable or religious institutions.**—

Leavell's Adm'r v. Arnold, Ky., 115 S. W. 232.

105. **Tenancy in Common.**—**Action to Recover Land.**—Where one tenant in common sues to recover a tract of land, he may recover the entire tract owned by all the co-tenants from a trespasser or one holding without title.—*Caruthers v. Hadley*, Tex., 115 S. W. 80.

106. **Torts.**—**Persons Liable.**—Where two or more persons, either severally or jointly and severally, contribute to an injury, each is, as a general rule, liable for the entire damage.—*Wisecarver & Stone v. Chicago, R. I. & P. Ry. Co.*, Iowa, 119 N. W. 532.

107. **Trade Marks and Trade Names.**—**Unfair Competition.**—A manufacturer, which has adopted a name or device not subject to appropriation as a trade-mark to designate its goods, is still protected in its use from unfair competition.—*Wolf Bros. & Co. v. Hamilton-Brown Shoe Co.*, U. S. C. C. of App., Eighth Circuit, 165 Fed. 413.

108. **Trusts.**—**Resulting Trusts.**—It is indispensable to the existence of a resulting trust on the ground that the money of complainant had been used to acquire the title to the land in another that complainant should have been the owner of the money so used.—*Martin v. New York & St. L. Mining & Mfg. Co.*, U. S. C. C. of App., Eighth Circuit, 165 Fed. 398.

109. **Vendor and Purchaser.**—**Enforcement of Vendor's Lien.**—Recourse against the successful bidder at a sale to enforce vendors' liens for the loss caused by failure to give bond is not lost by the commissioner's failure to report a subsequent sale to an insolvent, and the court's failure to compel the latter to give bond.—*Brand v. Pryor*, Ky., 115 S. W. 180.

110. **Wills.**—**Contracts to Devise.**—A promise by a grantee, in consideration of the conveyance, to make her last will devising her property to a named person, held to create no estate or equitable interest in praesenti in the person named as devisee.—*Noble v. Metcalf*, Ala., 47 So. 1007.

111.—**Estate Created.**—Where a will creates in the devisee an estate in fee simple, a subsequent clause, providing for a limitation over as to any portion of the estate remaining on the death of the devisee, is void for repugnancy.—*Hawley v. Watkins*, Va., 63 S. E. 560.

112.—**Writing Attached to Will.**—A writing attached to a will testamentary in character, but not executed with the formalities required of a will, cannot be received to sustain a claim as devisee.—*In re Benner's Estate*, Cal., 99 Pac. 715.

113. **Witnesses.**—**Cross-Examination.**—Where a witness based his testimony on certain records showing the facts to which he testified, and was unable to testify without using such records to refresh his memory, opposing counsel was entitled to have such records for use in cross-examining such witness.—*Harman v. Illinois & Eastern Coal Co.*, Ill., 86 N. E. 625.

114. **Waters and Water Courses.**—**Flooding Land.**—In trespass for flooding land, whereby timber was destroyed, which plaintiff had a right to cut for a certain number of years under a lease, damages for the timber destroyed by the flooding were recoverable.—*Woodstock Hardware & Spool Mfg. Co. v. Charleston Light & Water Co.*, S. C., 63 S. E. 548.

115.—**Obstruction of Stream.**—A city held entitled to an injunction to restrain defendant from dredging for gold in a stream in such manner as to obstruct its natural flow and increase the danger of overflow, to the injury of health and property in such city.—*City of Oroville v. Indiana Gold-Dredging Co.*, U. S. C. C., N. D. Cal., 165 Fed. 550.